IN THE MATTER OF MERCHANT MARINER'S DOCUMENT No. Z-1173511 AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Craig Joseph FORSYTH

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1838

Craig Joseph FORSYTH

This appeal has been taken in accordance with Title 46 United States Code 239b, and Title 46 Code of Federal Regulations 137.30-1.

By order dated 12 September 1969, an Examiner of the United States Coast Guard at New Orleans, La., revoked Appellant's seaman's documents upon finding him guilty of addiction to the use of narcotics and incompetence. The specifications found proved allege that Appellant:

(1) being the holder of the document above captioned was on 30 January 1969 addicted to the use of a narcotic drug (Charge One), and

(2) while serving as engine maintenance aboard SS CRISTOBAL on 2 September 1969, under authority of the above captioned document, incompetent to perform his assigned duties.

At the hearing, Appellant elected to act as his own counsel. Appellant entered a plea of not guilty to the charges and each specification.

The Investigating Officer introduced in evidence the testimony of a doctor of the United States Public Health Service.

In defense, Appellant testified in his own behalf.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charges and specifications had been proved. The Examiner then entered an order revoking all documents issued to Appellant.

The entire decision was served on 17 September 1969.

Appeal was timely filed on 24 September 1969. Although appellant had until 29 December 1969 to complete his appeal he has added

nothing to his original notice and statement of grounds.

FINDINGS OF FACT

On 30 January 1969, appellant reported to the U. S. Public Health Service Hospital at New Orleans, stating that about six months earlier he had struck himself on the head with a piece of iron and that thee was, at the time of appearance at the hospital, a swelling of his right hand and arm.

The examining physician, looking at the arm for possible infection, noticed multiple puncture marks over the veins. When the doctor asked appellant how these marks had come about, appellant replied that he was a heroin addict, and that he had used heroin about a half hour earlier. However, he claimed to have "kicked" the habit in April, 1968.

The doctor's superior advised Appellant that he should seek admission to the Public Health Service Hospital at Fort Worth for treatment and warned him that the Coast Guard would revoke his Merchant Mariner's Document because of his condition.

Appellant did not seek treatment for his condition. Seven months later he was serving aboard SS CRISTOBAL.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is contended that the findings cannot stand because the opinion of the doctor was not based on any medical tests and that the doctor was not telling the truth.

Because of the disposition to be made of the second Charge in this case Appellant's argument on that matter need not be discussed.

APPEARANCE: Appellant, pro se.

OPINION

I

Appellant's two points can be discussed together.

The doctor testified that she looked at Appellant's arm, which, he had complained, was swollen, to examine it for possible infection. She noticed numerous needle marks at the veins. This circumstance, together with Appellant's admission that he used

heroin and had just recently had a "shot" rendered further examination unnecessary. When a person admits to a doctor that he uses and has recently used a narcotic drug there is no need for the doctor to subject the person to tests to ascertain his condition. Indeed, what the doctor did here was the logical and reasonable outcome of the interview, to recommend that Appellant submit himself voluntarily to treatment for cure at U.S.P.H.S. Hospital, Fort Worth, a facility specially equipped to treat addicts.

Appellant said at the hearing, however, and says again, that the doctor was not telling the truth, that what he had said was that he had had the habit, but had "kicked" it in April, 1968. He testified that the old marks stood out prominently in cold weather.

This is resolved to a question of credibility as to the conversation in question. The trier of facts accepted the doctor's testimony as true. The testimony is not inherently incredible. It constitutes, as to Appellant's condition at the time of examination and as to his admissions, substantial evidence of addiction to heroin.

It must be noted additionally that appellant made an admission in open hearing that he had been an addict although he claimed to have "kicked" the habit on April, 1968. Under 46 U.S.C. 239b, there is authority to revoke the seaman's document of any person "who has been subsequent to July 15, 1954, a user of or addicted to the use of a narcotic drug" unless satisfactory proof of cure is furnished to the examiner. No proof of cure was offered here other than Appellant's self-serving statement.

In this connection a point may be made to dispel some misconceptions of persons involved in hearings under 46 U.S.C. 239b. Appellant chose April, 1968 as the time of his "kicking" the habit. While finding addiction as of January, 1969 the Examiner pointedly made a finding that Appellant's Merchant Mariner's document was issued in August, 1968. The finding was surplusage. The allegation was only that "being [now, at the time of hearing] the holder of the captioned documents . . . [Appellant was]...on or about 30 January 1969...addicted to the use of a narcotic drug."

There is nothing in the statute that requires that a person whose document is proceeded against have been a "holder" at the time of the addiction or use, or even at the time of conviction for violation of a narcotic drug law.

As to revocation for "convictions," it is enough that the conviction have occurred within ten years prior to the date the action under 46 U. S. C. 239b is instituted, whether the now-holder held a document at the time of conviction or not.

As to revocation for "use or addiction," there is no ten year provision, it is enough that the use or addiction have occurred or existed after 15 July 1954, and this without regard to whether the person was a holder of a document at the time of use or addiction.

III

There is a point not raised at hearing, nor on appeal, which is raised by the Examiner himself in his opinion. This deals with the testimony of the doctor in view of what the Examiner calls "the 'Patient and Physicians Communications' doctrine."

The Examiner concluded that admission of the evidence was not violative of the "doctrine." I agree that the Examiner was correct in admitting the evidence but not for the reasons which the Examiner gives.

I first quote the Examiner's opinion on this point:

> " I consider that admission of Dr. Trice's testimony in this hearing was not violative of the "Patient and Physicians Communications" doctrine for the following reasons:
>
> 1. Dr. Trice's testimony was solely in connection with the aforementioned determination of the U. S. Public Health Service Hospital that Mr. Forsyth was not fit for duty which was transmitted to the U. S. Coast Guard as aforementioned.
>
> 2. The services of the U. S. Public Health Service Hospital were available to Mr. Forsyth solely by reason of his being an active seaman.
>
> 3. It was the duty of the U. S. Public Health Service Hospital under existing law and regulations to advise the U.S. Coast Guard as concerns Mr. Forsyth's fitness for duty at sea.
>
> 4. 46 Code of Federal Regulations 137.03-25 entitled Physician-Patient Privilege reads as follows:
>
> > "For the purpose of these proceedings, the physician-patient privilege is not considered to exist between a ship's physician and a seaman employed on the same ship."

> "To my way of thinking I can see no difference as concerns the medical service furnished the seamen referred to in the above referred to regulations and the medical service furnished to Mr. Forsyth by Dr. Trice of the U. S. Public Health Service Hospital."

The Examiner's reasons why the evidence should be admissible are persuasive, but they are not convincing that the evidence is admissible. It is reasonable that if one agency of the Federal government is required to provide free medical services to a seaman if the seaman is qualified for services and desires them the seaman should expect that another agency of the Federal government which passes upon his qualification to meet federal requirements for employment should have access to his medical qualifications as found by a Federal agency. But I know of no law or regulation which requires the Public Health Service "to advise the U. S. Coast Guard" as to a person's fitness for duty at sea" except when the U.S. Coast Guard is the agency referring the person to the Public Health Service for examination. (See 42 CFR 1 and 32.) This was not a case in which the Coast Guard referred Appellant for examination, and no law requires disclosure of information in any other case.

The analogy drawn by the Examiner between 46 CFR 137.08-25 and the situation involving the Public Health Service is attractive, but not controlling.

IV

I prefer to look elsewhere for guidance in decision on this matter.

Decision here could be based on the theory that a "physician-patient" privilege is one that may be waived where available, and on the facts that the privilege is available usually only to be patient and that Appellant here did not at hearing and does not on appeal claim the privilege. Here again, while not rejecting the means available to sustain the Examiner's ruling, I prefer to bottom any decision on a broad consideration of the subject as possibly useful to personnel involved in future cases of this kind.

V

So viewed, this is a case of novel impression, in appeals under 46 CFR 137.

There is no common law privilege attaching to

physician-patient communications, as there was to the marital situation. In every jurisdiction in which there is a physician-patient communications privilege it is a creature of statute. Many Federal court decisions deal with the privilege but these are found to be in cases where the law of the District of Columbia was involved or in cases in which the "diversity" clause is the basis for jurisdiction of the Federal law or rule of evidence according the privilege in all matters under Federal law or administrative procedure.

The regulations governing the Public Health Service itself recognize that there is no Federal law imposing the requirements of the privilege if the patient insists. The regulations specifically provide that the service will furnish information as to a patient to any agency referring the patient for examination. 42 CFR 1.102. The regulations also provide that information will be provided on order to any judge of a court of competent jurisdiction, agency, or official, authorized to issue a subpoena. 42 CFR 1.104. This last also provides that "local law" shall be observed as to the physician-patient privilege as construed by the court, agency, or official. 42 CFR 1.104 thus recognizes that there is no one Federal law inhibiting disclosure of information received in physician-patient relationship. The "local" law will control.

The "local law" in a proceeding under R.S. 4450 (46 U.S.C. 239) or 46 U.S.C. 239b is the law of the United States, not the law of an individual State. It is easily apparent that in proceedings under 46 CFR 137 there must be uniformity of application of law and regulation to seamen. It cannot be proper that as to testimony of a doctor as to disclosures to the doctor by a merchant seaman a different rule should apply if the hearing were held in California, Louisiana, or New York. It is therefore seen that the "local law" provision of 42 CFR 1.104 must be construed, in proceedings exclusively under Federal jurisdiction, as reference to Federal law.

Since there is no Federal law establishing a physician-patient "privilege" relationship, the "local law" is that no privilege exists.

VI

My view here is strongly supported by the provisions of 42 U.S.C. 260. This law provides for voluntary commitment of any narcotics addict who is not a convict for treatment at a U.S.P.H.S. facility specially equipped for treatment of narcotics addicts. (It will be recalled that the doctor in the instant case suggested to Appellant that he submit to treatment for cure. That Appellant did not do.) Subsection (d) of this section specifically provides

that no information obtained about an addict who submits to hospitalization under this section for treatment and cure can ever be used against him in a court action. This subsection accords a privilege to a class of persons not granted to other patients of the U.S.P.H.S. The fact that the statutory privilege is accorded to this one class, and not to other classes of persons authorized for examination and treatment by the U.S.P.H.S. is convincing that the Federal law does not legislate a general "physician-patient" privilege against physician's testimony in the patient's case over objection by the patient.

VII

If it should be urged that 46 CFR 137.03-25, which declares that there is no physician-patient privilege as to communications between a member of the crew of a ship and the ship's doctor, requires that a privilege be accorded in all cases under 46 CFR 137 other than those involving a ship's doctor and a member of the crew, I can say only that the argument is ill-founded. The section of the regulations cited does not specify that there is a privilege existing; it specifies only that there does not exist a privilege in a particular case. Since there is no Federal law according the "privilege" except in specific cases, the regulation does not preclude the introduction of medical evidence from doctors other than those serving on a ship.

VIII

One other matter remains. It was found proved that Appellant was incompetent for sea service on 2 September 1969 while serving aboard CRISTOBAL. No evidence was introduced specifically touching on incompetency on that date. In the ordinary case this fact would be of little concern. It would be entirely proper to allege that a person was incompetent on a certain date and "is now" and then to prove a condition existing before the date specified. This is permissible in many cases when the condition proved to exist on the earlier date is of a permanent nature or persistent nature so that it can be reasonably be presumed to have continued from the date proved to the present.

In this case, however, the only evidence as to any condition of Appellant is that of addiction to narcotics on 30 January 1969. This by itself would be enough to raise the presumption of incompetence on 2 September 1969, subject of course to rebuttal proof that the condition had ceased to exist, but even so the incompetence alleged and found proved in this case is no more or less than the addiction to narcotics alleged and proved under a

different charge.

The Second Charge in this case is thus absolutely duplicitous of the first.

CONCLUSION

I conclude that the Second Charge should be dismissed as being a duplication of the first but that the order of the Examiner is appropriate and necessary.

ORDER

The findings of the Examiner, made at New Orleans, La., on 12 September 1969, are MODIFIED, to find only that on 30 January 1969 Appellant was addicted to the use of a narcotic drug, and as MODIFIED are AFFIRMED. The charge that Appellant was incompetent on 2 September 1969 is DISMISSED. The Order of the Examiner, entered at New Orleans, La., on 12 September 1969 is AFFIRMED.

C. R. BENDER

Signed at Washington, D.C. this 23rd day of April 1971.

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